



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 62 OF 2001

MWANGI KANYINGI PLAINTIFF

VERSUS

FRANCIS KARIUKI KANYINGI 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

J U D G M E N T

By a plaint dated 2nd March 2001 and which was filed in court on 6th April 2001 the Plaintiff prayed for judgment against the Defendants jointly or severally in terms that:-

- “a) An order cancelling the 1st Defendant’s fraudulent registration as proprietor of the parcel of land known as Kiine/Thigirichi/177 and the rectification of the register by reinstating the Plaintiff as the lawful proprietor of the said parcel of land.**
- b) An order of indemnity for loss suffered by the Plaintiff as a result of the unlawful and fraudulent acts of the 1st Defendant and Land Registrar Kirinyaga District on whose behalf the 2nd Defendant has been sued.**
- c) Such other order as the court may in its discretion grant to achieve the ends of justice.**
- d) Costs of the suit**
- e) Any other relief this Honourable court may deem fit and fair.”**

Both the 1st and the 2nd defendants filed their respective defences denying the Plaintiff’s claim and also praying for the dismissal with costs to them of the plaintiff’s suit.

On the hearing date only the Plaintiff and 1st Defendant appeared. The 2nd Defendant though served with the hearing notice failed to turn up. Being satisfied as to the service, I directed that the suit proceeds to hearing the absence of the 2nd Defendant and or his counsel notwithstanding. Accordingly only the Plaintiff testified in support of his case. The 1st Defendant too testified, but was backed by one witness.

In his evidence the Plaintiff testified that he was the registered proprietor of land parcel **Kiine/Thigirichi/177** hereinafter referred to as *“the suit premises”* and that his step brother the 1st

defendant whom he preferred to call **Francis Kariuki Kanyingi** masqueraded as **Mwangi Kanyingi** and obtained title to the suit premises as though he was the plaintiff. It was his evidence that the suit premises were given to him by the clan and for which he paid Kshs.30/=. That he was a freedom fighter who had been detained at Manyani. On being released however he went home and was later given the suit premises by his Unjiru clan in 1960. Subsequent thereto he got a title to the same. In 1979, however, the 1st Defendant forcefully entered the suit premises and has remained thereat since. He testified that as early as in 1981 he had filed a suit being R.M.C.C No. 36 of 1981 at Embu against the 1st Defendant and their father **Kanyingi Njengwa** for their eviction from the suit premises. He further testified that though he had obtained judgment on 5th November 1982 the 1st Defendant had not been evicted from the suit premises. In 1998 he again instructed his current advocates on record to write demand notices to the 1st Defendant, the Land Registrar, the DCIO and the Attorney General questioning how the 1st Defendant had come to be registered as the proprietor of the suit premises. The response not forthcoming and or being unsatisfactory, the Plaintiff settled for the instant suit which hinged on the fact that the transfer and subsequent registration of the suit premises in the names of the 1st defendant was tainted with fraud. His evidence was that he was given the suit premises by his clan and at no single time did he transfer the same to the 1st defendant. He never consented to such transfer. However in cross examination he also conceded that he had been allocated another parcel of land known as **Kiine/Ruiru/644**. It also emerged during cross examination that the plaintiff had never resided, cultivated nor developed the suit premises. All along he has resided and developed land parcel **Kiine/Ruiru/644**. When asked whether one could be allocated two different parcels of land by the same clan during the colonial times, he adamantly answered that nothing would have prevented a person from getting two parcels of land or even more. He was however unable to give the name of any other person who was allocated two or more parcels of land by their clan during that time. The Plaintiff also conceded that he knew about the title deed obtained by the 1st Defendant with regard to the suit premises as early as 1982 which was about 16 years before the first demand letter by his current advocates was written. He also admitted that between 1998 when the first demand letter was written and 2001 when this suit was filed there had been a time lapse of 4 years and that nothing had prevented him from filing the current suit in good time. Concluding his testimony he urged this court to evict the 1st defendant so that the suit premises can revert to him. The register too should be rectified as appropriate. He also prayed for costs.

In his defence the 1st Defendant testified and called **Gichira Muchiri Ngiriri** the current chairman of their clan as a witness. It was the evidence of the 1st Defendant that though he was known by the names **Francis Kariuki Kanyingi** he was also alias **Francis Mwangi Kanyingi**. It was also his evidence that his family had been allocated 3 parcels of land by the clan. The first parcel was allocated to the Plaintiff's and 1st Defendant's father, **Kanyingi Njengwa**. This parcel of land was later acquired and a public school constructed thereon. However their father aforesaid was compensated with another parcel of land upon which their younger brother now resides. The second parcel of land was **Kiine/Ruiru/643** which on first registration in 1960 had been allocated to the Plaintiff. However because of the confusion as to ownership on the ground there was rectification of the Register by consent of the parties concerned i.e. **Kiama Gachirigua** and the Plaintiff under Section 142(1) (b) of The Registered Land Act and the Plaintiff was now the registered proprietor of land parcel **Kiine/Ruiru/644**. apparently the Plaintiff had moved in and settled in land parcel number 644 aforesaid instead of 643. The third parcel of land was the suit premises. It was his evidence that the suit premises belonged to him but, which on first registration was registered in the name of **Mwangi Kanyingi**. It was the 1st Defendant's case that he and the Plaintiff shared the name **Mwangi** and it is for this reason that he subsequently corrected his name from **Francis Kariuki Kanyingi** to **Francis Mwangi Kanyingi** and obtained the title deed to the suit premises on 30th March 1981. Prior to this date however the Plaintiff had unlawfully and without colour of right obtained a title deed to the suit premises on 7th December 1973 but when requested severally to surrender it by the District Land Registrar, Kirinyaga, he failed to do so. As for the case filed in 1981, the 1st Defendant whilst admitting that he had been served with summons to enter appearance, he denied having been served with any hearing notice for the same. As far as he was concerned the case was never prosecuted to finality.

The 1st Defendant's case was supported in all its material aspects by his only witness **Gabriel Gichira**

Muchiri Ngiriri who testified that he was the current Chairman of the Unjiru clan. This witness confirmed that the Plaintiff and the 1st Defendant were step brothers, and were members of his clan who shared a common name **Mwangi** but each had an alias:- the Plaintiff was **Mwangi** alias **Kibutha** while the 1st Defendant was **Mwangi** alias **Kariuki**. It was the evidence of this witness that the parties had each been allocated one parcel of land by the clan in addition to the one allocated to their father. The Plaintiff's land was **Kiine/Ruiru/644** while the 1st Defendant's land was **Kiine/Thigirichi/177** which was adjacent to his parcel of land and that it is the 1st Defendant who had since developed the said land to the exclusion of the Plaintiff. This witness also confirmed that during land consolidation nobody could be registered as proprietor of two separate parcels of land by their clan.

At the close of the 1st Defendant's case, counsel for respective parties agreed to put in written submissions in support of their case. I have had the benefit of reading the said written submissions together with the authorities cited. The parties herein had earlier framed and agreed on the issues for determination by this court in this dispute. These were:-

1. **Whether the 1st Defendant is also genuinely known as *Francis Mwangi Kanyingi*? And if not so, whether the 1st Defendant has changed his name so as to impersonate the Plaintiff.**
2. **Whether the Plaintiff was the lawful registered owner of the suit property as at May 1960.**
3. **Whether the 1st Defendant in collusion with the officers at the Land Registry and in circumstances unknown to the Plaintiff has carried out a search in the Land Registry relating to the suit property and if so whether he has fraudulently caused the records in the registry to be altered in respect of the suit property.**
4. **Whether the 1st Defendant has unlawfully and in connivance and/or collusion with officers in the Land Registry obtained a land certificate to the suit property and if so, whether the 1st Defendant has fraudulently caused to be transferred in his name the suit property.**
5. **Whether the Plaintiff has at one time authorised the transfer of the suit property to another person or the 1st Defendant? If so whether the Plaintiff has recognised the 1st Defendant as the lawful owner of the said property.**
6. **Whether the Plaintiff has suffered any loss or damage as a result of the alleged fraudulent transfer of the suit property and whether the Plaintiff has sought to lawfully evict the 1st Defendant from the suit property.**
7. **Whether the Plaintiff has suffered any loss or damage as a result of the alleged fraudulent transfer? And if so what orders is the Plaintiff entitled to.**
8. **Whether there has been previous proceedings between the parties herein relating to the same subject matter and whether the suit filed herein is filed within time?**
9. **What Orders should be made in respect of costs.**

In my view however, issue number 8 above may well determine the fate of this case! If that be the case then there will be no need to consider the other issues framed as above. In paragraph 10 of the 1st Defendant's statement of defence it is averred that the Plaintiff's cause of action is time barred under the provisions of Section 4(2) and Section 7 of the Limitation of Actions Act. There was no reply to this averment by the Plaintiff. The issue too was raised in the written submissions filed by the 1st defendant and served on the Plaintiff. However the plaintiff did not see the need to respond and or counter the same. A careful reading of the plaint filed herein shows that the Plaintiff's case is premised on a claim for land that was allegedly taken away from him through fraud. Limitation of Actions Act provide the time lines within which certain causes of action may be brought and ventilated in court. Of particular

interest to us and in so far as this case is concerned is **Section 4 (2) and 7** of the said act which provides interlia:-

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action arose.”

Section 7 of the same act provides:-

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

It is the Plaintiff's contention that the 1st Defendant fraudulently and without his consent or authority caused the suit premises to be transferred to himself. Fraud is a tort which means that this case ought to have been filed within 3 years from the date on which the cause of action accrued. The 1st Defendant's exhibit number 1 which is a copy of the register in respect of land parcel **Kiine/Thigirichi/177** suggests that the first registration thereto was effected on 5th May 1960. According to the Plaintiff he first learnt that the 1st Defendant had obtained title to the suit premises sometimes in 1982. If his claim is based on fraud as averred in paragraph 6 of the plaint then he ought to have filed the instant suit latest by 1985. However this suit was not filed until 2001 which was after a period in excess of 19 years. Clearly under Section 4 (2) of the Limitation of Actions Act this suit was filed out of time and therefore time barred. How about section 7 of the same Act. The same rationale applies. By the time he filed the suit 12 years had long expired. The latest that he could have successfully filed the suit should have been sometimes in 1994. Yet again this suit was filed on 6th April 2001. No evidence was tendered to show that the plaintiff ever sought and obtained leave to file suit out of time. If indeed there was any such extension of time it was incumbent upon the plaintiff to prove it. No such prove was however forthcoming at the close of the Plaintiff's case. In any event when cross-examined by counsel for the 1st Defendant the Plaintiff categorically stated that nothing prevented him from taking action against the 1st Defendant after he learned in 1982 that the 1st Defendant had fraudulently obtained title to the suit premises. He also conceded that 16 years had elapsed between the date when the cause of action accrued in 1982 and 1998 when the first demand letter was fired to the 1st defendant. He also conceded that 4 years elapsed between the date of the first demand letter in 1998 and the filing of this suit in 2001.

It is now well settled law that for one to file a suit outside limitation period enshrined in the Limitation of Actions Act, the applicant has to avail himself of the provisions of Section 27 of the Act which provides interlia that Section 4 (2) shall not afford a defence to an action founded on tort where the action is for damages for negligence, nuisance or breach of duty, the damages claimed consist of or include damages in respect of personal injuries of any person, the court gives leave for the purpose of the section, and the requirements of subsection 2 thereof are fulfilled in relation to the cause of action.

In the judgment of **Trevelyan J.** in the case of **Mweu v/s Kabai & Another reported in 1972 (E.A.) 242** the learned Judge held:-

“The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until the date which”

In view of this authority the Plaintiff could not even have availed himself of the Provisions of Section 27 of the Limitation of Actions Act. The Plaintiff also adduced and produced in evidence the Judgment of the Principal Magistrate's Court at Embu in civil case number 36 of 1981. However this court was informed by the Plaintiff that the said judgment had never been executed. Section 4 (4) of the Limitation of Actions Act again provides that:-

“An action may not be brought upon a judgment after the end of 12 years from the date on which

the judgment was delivered.

The Principal Magistrate Court's Judgment in Embu dated 5th November 1982 was about 20 years old at the time of filing of the instant suit. Due to the provisions of Section 4(4) of the Act aforesaid the said judgment had been rendered worthless by effluxion of time and does not advance the Plaintiff's case any further.

In any event that decision would obviously raise the doctrine of Res Judicata. It is noted that the case just like the instant case was filed by the Plaintiff against the 1st Defendant. It was founded more or less same facts and or cause of action as in the instant case viz illegal occupation of the suit premises by the 1st defendant. It concerned the same suit premises as herein. The finding by the magistrate was that the 1st Defendant was a trespasser and ordered for his eviction. Though the suit herein is premised on fraud and the prayers sought are different, there is no denying that the net effect of what is sought herein is to put the Plaintiff into possession of the suit premises. The issue of the 1st Defendant having irregularly and fraudulently caused the suit premises to be transferred to himself was directly and or substantially issue in the earlier suit. After all, the said suit was filed in court on 5th August 1981. In his own evidence in this court and by his own pleadings, the plaintiff admitted, that by 1981 and before filing the aforesaid suit he already knew that the 1st Defendant had fraudulently assigned title to the suit premises to himself. In terms of explanation number (4) under Section 7 of the Civil Procedure Act the fraudulent acquisition of the title by the 1st Defendant was a matter directly and substantially in issue or sought to have been in that earlier suit.

For all the foregoing reasons I find that Plaintiff's suit is bad in law having been filed out of time without leave of court being sought and obtained. It might also be Res Judicata. Accordingly it is dismissed with costs to the 1st Defendant.

Dated and delivered at Nyeri this 28th day of November 2008

M. S. A. MAKHANDIA

JUDGE